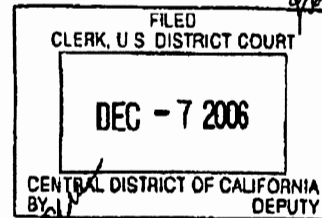


EXHIBIT 5



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 ANNE E. CLAYTON,

11 Plaintiff,

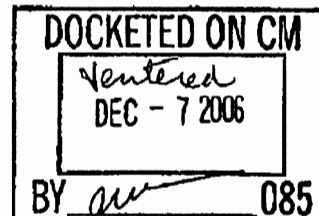
12 vs.

13 MERCK & CO., INC., a New Jersey
14 Corporation; McKESSON
15 CORPORATION, a Delaware
corporation; DOES 1-50

16 Defendants.

CV 06-6398 FMC (PJWx)

ORDER GRANTING DEFENDANT'S
MOTION TO STAY AND DENYING
PLAINTIFF'S MOTION TO REMAND



19 This matter is before the Court on Plaintiff's Motion to Remand to State
20 Court (docket no. 10), and Defendant Merck & Co., Inc.'s Motion to Stay
21 Proceedings (docket no. 12), filed on November 3, 2006 and November 8, 2006,
22 respectively. The Court has considered the moving, opposition and reply
23 documents submitted in connection with the motions. The Court deems this
24 matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78,
25 Local Rule 7-15. Accordingly, the hearing set for December 11, 2006, is
26 removed from the Court's calendar. For the reasons and in the manner set forth
27 below, the Court GRANTS Defendant's Motion to Stay and DENIES Plaintiff's

19

1 Motion to Remand without prejudice to the filing of a renewed motion in the
 2 event that the Judicial Panel on Multidistrict Litigation ("JPML") does not
 3 transfer this case to Multidistrict Litigation ("MDL") No. 1789, *In Re: Fosamax*
 4 *Prods. Liab. Litig.*

5 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

6 Plaintiff, Anne E. Clayton, took the prescription drug Fosamax, which is
 7 manufactured and sold by Defendant Merck & Co., Inc. ("Merck") and
 8 distributed by Defendant McKesson Corporation ("McKesson"). Plaintiff filed
 9 her Complaint in the Superior Court for the State of California, County of Los
 10 Angeles, on September 28, 2006. Plaintiff alleges, *inter alia*, that Defendants
 11 misrepresented (affirmatively and through a failure to warn) that Fosamax was a
 12 safe and effective treatment for osteoporosis, Paget's Disease and other
 13 conditions. Plaintiff further alleges that, as a proximate result of ingesting
 14 Fosamax, she has been permanently and severely injured.

15 On October 6, 2006, Defendant Merck removed the action to this Court on
 16 the basis of diversity under 28 U.S.C. § 1332, alleging that Defendant McKesson,
 17 a California citizen, is fraudulently joined. In her motion to remand, Plaintiff
 18 argues that joinder was proper. In its Opposition to the motion and in its
 19 separate Motion for Stay, Merck maintains that resolution of the question of the
 20 propriety of Plaintiff's joinder of McKesson should be deferred pending transfer
 21 of this action to the MDL proceedings in *In Re Fosamax Prods. Liab. Litig.*, and
 22 that all other proceedings in this action should be stayed until such time.¹
 23 McKesson joins in Merck's Opposition to the motion to remand and the Motion

24
 25 ¹Pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict
 26 Litigation, the JPML issued a Conditional Transfer Order on November 2, 2006. Plaintiff's Motion
 27 to Vacate that Order is currently pending. See Request for Judicial Notice in Support of Merck &
 Co., Inc.'s Opposition to Plaintiff's Motion to Remand, Exhibits 1-2.

1 to Stay in all respects.

2 STANDARD OF LAW

3 "A trial court may, with propriety, find it is efficient for its own docket and
 4 the fairest course for the parties to enter a stay of an action before it, pending
 5 resolution of independent proceedings which bear upon the case." *Leyva v.*
 6 *Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979); *see also*
 7 *Landis v. North American Co.*, 299 U.S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163
 8 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in
 9 every court to control the disposition of the causes on its docket with economy of
 10 time and effort for itself, for counsel, and for litigants.").

11 DISCUSSION

12 A stay of all proceedings until such time as the JPML renders its final
 13 decision regarding transfer is in the interest of judicial economy. A steady
 14 succession of cases involving the drug Fosamax are being filed in this district
 15 and other districts throughout the country and are awaiting transfer to the MDL
 16 proceedings.² Given the similarity of this litigation to other recent
 17 pharmaceutical products liability litigation, the Court finds that there are likely to
 18 be many more cases (in this district or otherwise) which present the precise
 19 question of the propriety of joinder of Defendant McKesson and/or other
 20 "distributor" defendants.³ Consideration of Plaintiff's remand motion by this

21
 22 ² According to the JPML website, there are now 58 actions pending in MDL No. 1789, *In Re:*
 23 *Fosamax Prods. Liab. Litig.* See http://www.jpml.uscourts.gov/Pending_MDLS/pending_mdls.html (follow "Distribution of Pending MDL Dockets").

24 ³ As Defendants point out, two Fosamax cases which name both Merck and McKesson as
 25 Defendants were recently removed (by Merck) to the district courts for the Northern and Southern
 26 Districts of California. See Request for Judicial Notice in Support of Defendant Merck & Co., Inc.'s
 27 Reply Memorandum in Support of Motion to Stay Proceedings, Exhibits 2-3. The Court takes
 judicial notice of the fact that Merck is raising the same issues of fraudulent joinder in those cases

1 Court at this juncture would therefore run the risk of inconsistent rulings between
2 different judges in different districts and/or would constitute an inefficient use of
3 judicial resources. *Cf. Stempien v. Eli Lilly & Co.*, 2006 U.S. Dist. LEXIS
4 28408 *4 (N.D. Cal. 2006) (“[E]ven if the Court were to grant Plaintiffs’ motion
5 to relate all Zyprexa cases naming McKesson Corporation in this district, judges
6 in other California districts would nonetheless have to decide the issue, thus
7 resulting in unnecessarily duplicative litigation, an inefficient use of judicial
8 resources, and the risk of inconsistent results.”).

9 **CONCLUSION**

10 Based on the foregoing, Defendant Merck & Co., Inc.’s Motion to Stay
11 Proceedings (docket no. 12) is GRANTED. Proceedings in this case are
12 STAYED until issuance of a final decision by the JPML regarding transfer or for
13 sixty (60) days, whichever is earlier.

14 Plaintiff’s Motion to Remand (docket no. 10) is DENIED without
15 prejudice to the filing of a renewed motion if transfer is denied.

16
17 IT IS SO ORDERED.

18 December 7, 2006



19 FLORENCE MARIE COOPER, JUDGE
20 UNITED STATES DISTRICT COURT
21
22
23

24 and has filed a similar motion to stay proceedings pending possible transfer to the MDL action in
25 the Northern District case. *See* Fed. R. Civ. P. 201; *United States ex. rel. Robinson Rancheria*
26 *Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (court may take judicial notice
27 of “proceedings in other courts, both within and without the federal judicial system, if those
proceedings have a direct relation to matters at issue.”).